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No. 94-455

In the Supreme Court of the United States

OCTOBER TERM, 1994

TYSON JOHNSON, ROBERT DEEVEY, AND JOHN PAYNE, *Petitioners,*

v.

HOUSTON JONES, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's brief responding to the petition for a writ of certiorari in this case forthrightly acknowledges that review by this Court is appropriate because "there is a conflict [in the circuits] with respect to whether a Circuit Court of Appeals should review an interlocutory appeal taken from denial of a Motion of Summary Judgment where a qualified immunity defense is asserted and where the only issue on appeal is a purely factual question." Br. in Opp. 4.

Needless to say, we fully concur in this submission. We nevertheless submit this brief to clarify the nature of the conflict in the courts of appeals and to address recent action by this Court that emphasizes the importance of the issue presented in this case.

1. Respondent suggests that there is some distinction between cases where "(1) The Defendant loses the Motion for Summary Judgment where the facts are disputed as to whether the Defendant did the violation complained of * * *; and (2) the facts are not necessarily in dispute between the parties but the Defendant asks the Circuit Court of Appeals to review whether there was sufficient evidence of a violation for the District Court to be warranted in denying their Motion for Summary Judgment." Br. in Opp. 6. In fact, this dichotomy is not reflected in the cases. Whether or not any of the underlying facts were in dispute, the decisions of the First, Fourth, Eighth, Ninth, Tenth and District of Columbia Circuits that are cited in the petition (at Pet. 6-16) resolved a single question: whether summary judgment was properly denied because, "when all the facts [were] viewed in the light most favorable to plaintiff, there [was] a[] genuine issue [of fact], triable to a jury." *Wright* v. *South Arkansas Regional Health Center, Inc.*, 800 F.2d 199, 203 (8th Cir. 1986). In contrast, as respondent acknowledges, the Seventh Circuit considers itself without jurisdiction to resolve that question.[1]

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[1] Respondent suggests (Br. in Opp. 7) that the Second, Third, Fifth, and Ninth Circuits are aligned with the Seventh on this issue. In fact, as we explain in the petition (at 12-13), the Ninth Circuit expressly rejected the Seventh Circuit's approach in *Burgess* v. *Pierce County*, 918 F.2d 104, 105-106 (9th Cir. 1990). The earlier decision in *Velasquez* v. *Senko*, 813 F.2d 1509, 1511 n.3 (9th Cir. 1987), relied upon by respondent, had reserved the question "whether denial of a summary judgment motion based on defendants' non-involvement made after discovery is complete would present a properly appealable legal issue"; *Burgess* expressly

This conflict should be resolved by the Court.

2. The importance of settling the rules governing appellate jurisdiction over Section 1983 appeals is suggested by this Court's *sua sponte* order of October 31, 1994, directing the parties in *Swint* v. *Chambers County Commission*, No. 93-1636, to brief the question "[w]hether the Eleventh Circuit, by virtue of its jurisdiction to review the District Court's denial of the individual defendants' motions seeking summary judgment on the basis of qualified immunity, also had jurisdiction to review the District Court's denial of the Chambers County Commission's motion for summary judgment." In *Swint*, the plaintiff sued both the Chambers County Commission and several individual law enforcement officers under Section 1983. Motions for summary judgment filed by the officers and the Commission were denied; the officers then filed interlocutory appeals to advance their qualified immunity claims. Although the Commission is not entitled to assert an immunity defense, the Eleventh Circuit held that the pendency of the officers' immunity appeals gave the court "pendent appellate jurisdiction" over the Commission's interlocutory appeal from the denial of its motion for summary judgment on the merits. See 5 F.3d at 1449 ("'[p]endent jurisdiction is properly exercised over non-appealable decisions of the district court

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distinguished *Velasquez* on the ground that "discovery had not yet occurred in that case." 918 F.2d at 106 n.3. As we also explain in the petition (at 16 & n.6), the rule in the Second and Third Circuits is unclear. As for the Fifth Circuit, the court in *Boulos* v. *Wilson*, 834 F.2d 504, 509 (5th Cir. 1987), relied on *Velasquez* in dismissing an appeal from an order compelling limited discovery prior to a ruling on a qualified immunity claim; the court accordingly did not reach the question, presented here, whether it would have jurisdiction over an appeal taken after discovery in which the defendant contended that he had not committed the acts complained of by the plaintiff.

when the reviewing court already has jurisdiction over one issue in the case'" (citation omitted)).

We think it clear that this case should not be held pending resolution of the wholly distinct issue presented in *Swint*. There, the question is whether the pendency of a state official's concededly proper interlocutory immunity appeal confers jurisdiction to resolve *another party's* non-immunity appeal; the issue to be briefed by the parties is the general one whether pendent appellate jurisdiction may be exercised. Here, in contrast, the question is the logically precedent one whether a state official has a proper immunity claim in the first place when the plaintiff fails to adduce any evidence showing wrongful conduct, an issue that is not before the Court in *Swint*. That the Court believed it necessary to direct the parties' attention in *Swint* to the issue of jurisdiction, however, seems to confirm what the petition in this case suggests: that clear and uniform rules governing appellate jurisdiction over interlocutory appeals are essential.

3. This case accordingly presents an important and recurring issue on which the courts of appeals are divided. The significance of the question presented here is reflected by the *amicus* brief submitted in support of the petition by the City of Chicago, a frequent litigant in the Seventh Circuit, which notes that the issue settled below often arises in suits involving local, state, and federal officials. Br. 4. As Chicago explains, the holding below will involve public officials in protracted and vexatious litigation, while encouraging time-consuming and wasteful disputes about the existence of jurisdiction. Further review therefore is in order.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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